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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DONALD BORDENKIRCHER,
Superintendent,

Petitioner,

v.

JINKS ADKINS, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CHAUNCEY H. BROWNING
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QUESTION PRESENTED

Does a State Supreme Court-approved jury instruction on alibi, which reads:

> "The court instructs the jury that where the state has established a prima facie case and the defendant relies upon the defense of alibi, the burden is upon him to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such a degree of certainty, as will when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt as to the guilt of the accused,"

satisfy federal constitutional requirements to such a degree that it ought not to be disapproved by a federal appellate court?

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OPINIONS BELOW

Jinks Adkins, Jr. v. Donald Bordenkircher, Superintendent, West Virginia Penitentiary, Nos. 81-6811 and 81-6812, (4th Cir. March 24, 1982). Although this opinion is scheduled to be published, it is as yet unreported and is appended hereto as "Petitioner's Appendix A."

Jinks Adkins, Jr. v. Donald Bordenkircher, Superintendent, West Virginia Penitentiary, 517 F. Supp. 390 (S.D. W. Va. 1981). This opinion is appended hereto as "Petitioner's Appendix B."

GROUNDS OF THIS COURT'S JURISDICTION

The opinion below was entered March 24, 1982, with mandate to follow twenty-one (21) days thereafter, on April 14, 1982. There have been no orders

respecting a rehearing, or any orders granting an extension of time within which to petition for certiorari. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution Amendment XIV, § 1: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari from a judgment of the United States Court of Appeals for the Fourth Circuit affirming a judgment of the United States District Court for the Southern District of West Virginia insofar, and insofar only, as it affirmed the grant of a writ of habeas corpus to the respondent on the ground that an alibi instruction contested there, and approved by the West Virginia Supreme

Court of Appeals in State v. Alexander, ___ W. Va. ___, 245 S.E.2d 633 (W. Va. 1978), violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

In a petition filed with the United States District Court for the Southern District of West Virginia, Huntington Division, alleging jurisdiction under the provisions of 28 U.S.C. § 2254 et seq., respondent petitioned for habeas corpus alleging irregularities during the course of State court proceedings claimed to be of constitutional magnitude. Only two were considered by the magistrate, whose findings and recommendation were adopted by the District Court. One was that respondent was subjected to double jeopardy in the continuance of his trial over to a second jury upon motion by his counsel. This issue was decided against respondent at both District Court and Circuit Court levels and is not challenged here.

"In July of 1975 an Island Creek Coal Company store [in Logan County, West Virginia] was broken into and a safe was removed. A short time thereafter state police officers located the safe, which had been left, along with some tools, by the side of a creek in a rural area of Logan County. Believing that the thieves might return, the officers staked out the area. About two and one-half hours later a car with driver and two passengers approached the area and petitioner and the other passenger were let out. Petitioner's brother, driving the car, left the area, however, petitioner and his companion walked straight to the location of the safe. While petitioner acted as lookout, his companion attempted, without success, to break open the safe. After observing these activities for a period of time, the officers arrested both men. Subsequent investigation indicated that a car owned by petitioner had bits of grey paint on the trunk which, upon

analysis, were found to be similar to the grey paint on the safe casing removed from the store." (From Findings of District Court, 517 F. Supp. at 392-3.)

Respondent was first indicted on September 8, 1975, for breaking and entering, entering without breaking, and grand larceny. This indictment was incorrect in that it charged the taking of property belonging to "Island Creek Stores Company, a corporation." The trial was based on a second indictment, No. 1723, charging the same offense against "Island Creek Coal Copany, a corporation, doing business in the Trade Name of Island Creek Stores Company." The first jury was impaneled December 16, 1976, but a series of continuances laid the trial over to July 20, 1977.

Respondent's sole defense was based upon alibi witnesses, who testified concerning his whereabouts during the hours that the Island Creek store was

broken into and the safe taken. Respondent did not testify.

The judge offered the following instruction as to alibi, which is at issue here:

> "The court instructs the jury that where the state has established a prima facie case and the defendant relies upon the defense of alibi, the burden is upon him to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such a degree of certainty, as will when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt as to the guilt of the accused."

There was a general objection to the instruction but no specific objection to the language allegedly imposing a burden of proving alibi on the defendant.

The jury returned a verdict of guilty of breaking and entering and a one-to-ten year sentence was imposed by the Court. Thereafter, a petition for writ of error in the West Virginia Supreme Court of Appeals was refused, as was a petition filed under West Virginia's Post Conviction Habeas Corpus statute. Subsequent to the evidentiary hearing in the instant proceeding, another petition for habeas corpus was denied by the West Virginia Supreme Court in a published opinion, Adkins v. Leverette, ___ W. Va. ___, 264 S.E.2d 154 (1980).

On May 14, 1979, respondent filed his Petition for Habeas Corpus with the United States District Court for the Southern District of West Virginia. After appropriate proceedings, the Court narrowed down his claims to two: double jeopardy and the alibi instruction. It found against respondent on the double jeopardy claim but awarded the writ on the finding that the alibi instruction violated his due process rights in impermissibly shifting the burden of

proof of an element of the offense, contrary to In Re Winship, 397 U.S. 358, (1970); and Mullaney v. Wilbur, 421 U.S. 684 (1975); Adkins v. Bordenkircher, 517 F. Supp. 390 (S.D. W. Va.1981).

Both sides appealed, and in a decision rendered March 24, 1982, the United States Court of Appeals' for the Fourth Circuit affirmed. It rejected the West Virginia Supreme Court of Appeals' view that alibi is an affirmative defense and found that, whatever may be the burden of creating a reasonable doubt, the instruction was also confusing and misleading.

The State of West Virginia, through petitioner, now seeks certiorari from this Court to review these holdings which nullify its own rule of law and which, it believes, are contrary to the clear sense of the contested instruction.

ARGUMENT

THE INSTRUCTION AT ISSUE COMPLIES WITH ALL UNITED STATES SUPREME COURT REQUIREMENTS, AND SINCE IT IS WEST VIRGINIA LAW, SHOULD BE REAFFIRMED AS A MATTER OF COMITY.

It is a settled principle that prevailing rules of State law are to be overturned by the federal courts only when they clearly conflict with overriding federal rules. We respectfully submit that this case is an instance where there is no such conflict and where principles of respect for valid State law suggest intervention by this Court to validate an alibi instruction approved by the Supreme Court of Appeals of West Virginia and reverse the issuance of a writ of habeas corpus to respondent.

In State v. Alexander, ___ W. Va. ___, 245 S.E.2d 633 (1978), the West Virginia Supreme Court of Appeals sustained the validity of the alibi

instruction at issue here. In pertinent part, its language was:

> "State's Instruction No. 5 was given, as follows:
>
> > "'The Court instructs the jury that where the state has established a prima facie case and the defendants rely upon the defense of alibi, the burden is upon them to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such a degree of certainty, as will, when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt as to the guilt of the accused.'
>
> "Petitioners say that the instruction shifted an affirmative burden of proof to them. Alibi is an affirmative defense but does not relieve the prosecution of proving beyond a reasonable doubt the actual presence of the accused at the time and place of the commission of the crime when personal presence is essential

thereto. State v. Peterson, 132 W. Va. 99, 51 S.E.2d 78 (1948); State v. Aliff, 122 W. Va. 16, 7 S.E.2d 27 (1940); State v. Friend, 100 W. Va. 180, 130 S.E. 102 (1925); State v. Winans, 100 W. Va. 418, 130 S.E. 607 (1925); State v. Lowry, 42 W. Va. 205, 24 S.E. 561 (1896).

"In State v. Pendry, W.Va., 227 S.E.2d 210 (1976), we held that the alibi defense is not invalidated by Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) so long as the State is not relieved of the ultimate burden of proving beyond a reasonable doubt every material element of the crime, including of course that defendants committed it, which, in an armed robbery case, nearly always involves defendants' presence at the scene when the event occurred. The Court said:

> "'. . . When . . . [a defendant] . . . elects to take advantage of any authorized defense under the law of this State, he may be required to carry a burden of going forward with the evidence and carrying a burden of persuasion to a degree

not greater than by a preponderance of the evidence. The State is entitled to define the burden which he must carry if his particular defense is to be sustained, provided that this does not lessen the burden of the State to prove every material element of the crime beyond a reasonable doubt. 227 S.E.2d at 221.'

"If the state puts on proof that a defendant committed an act at X place, and defendant introduces evidence that he could not have done so because he was at Y place, then the court may properly instruct the jury, as was done here, that defendant had a burden to prove his defense sufficiently to create a reasonable doubt.

"Finding no error, we affirm." 245 S.E.2d at 636-637.

The United States Magistrate, United States District Court for the Southern District of West Virginia, and United States Court of Appeals for the

Fourth Circuit have disputed the West Virginia Supreme Court of Appeals' view. They reason (1) that alibi is not an affirmative defense but a direct negation of an element of the crime, and (2) to require that an alibi raise a reasonable doubt relieves the State of its due process obligation to prove all elements of a crime beyond a reasonable doubt, contrary to In Re Winship, 397 U.S. 358 (1970) and Mullaney v. Wilbur, 421 U.S. 684 (1975).

Although a number of jurisdictions characterize alibi as an affirmative defense, see 75 American Jurisprudence 2d Trial § 731, p. 658, and affirmative defenses have been held by this Court to be allowed to bear burdens of persuasion, Patterson v. New York, 432 U.S. 197 (1977), your petitioner believes that whether alibi is an affirmative defense is a tantalizing irrelevancy which has confused the issues in this case. Your petitioner does not deny that presence is an essential element in many crimes, nor that it should be

proven in such cases beyond a reasonable doubt. What it does deny is that the instruction at issue imposes any more "burden" on the defendant than if he had done nothing.

The whole issue is so simple as to require no citation to authorities. If the State proves its case beyond a reasonable doubt, the defendant is to be convicted. If, at the end of the jury's deliberations, there remains a reasonable doubt as to any element of the crime, the defendant is to be acquitted. This doubt can come from two sources: Absence of evidence on the part of the State, or evidence positively adduced on behalf of the defendant. In either event, if he is to prevail, the defendant bears the "burden" of having a reasonable doubt in the mind of the jury. Most obviously, if he seeks to present a defense such as alibi, his objective is to create a reasonable doubt in the mind of the jury. It is not a burden of proof

because it is not proof; it is the creation of doubt.

Since "reasonable doubt" is the exact converse of "beyond a reasonable doubt," it follows that the State is by no means relieved of its burden under Mullaney and Winship, supra, and that the defendant is saddled with no greater "burden" than he always bears to win an acquittal: To have a reasonable doubt in the mind of the jury. The West Virginia instruction is thus clearly constitutional.

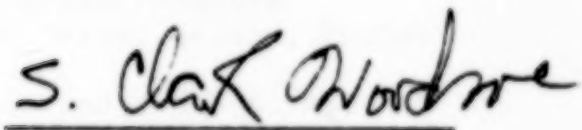
PRAYER

WHEREFORE, your petitioner, Donald Bordenkircher, Warden, respectfully prays that this Court grant a writ of certiorari for full review of this cause and the matters described herein.

Respectfully submitted,

DONALD BORDENKIRCHER,
Superintendent, West
Virginia Penitentiary

CHAUNCEY H. BROWNING
Attorney General



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Counsel for Petitioner

CERTIFICATE OF SERVICE

I, S. Clark Woodroe, a member of the Bar of the Supreme Court of the United States, do hereby certify that I served the within Petition for Writ of Certiorari upon Andrew S. Zettle, counsel for respondent, by placing three (3) true copies thereof in a United States mailbox, first-class postage prepaid, this 21st day of May, 1982, addressed as follows:

Andrew S. Zettle, Esquire
Huddleston, Bolen, Beatty, Porter
& Copen
Sixth Avenue and Tenth Street
Post Office Box 2185
Huntington, West Virginia 25722

S. Clark Woodroe

S. CLARK WOODROE

SUPREME COURT OF THE UNITED STATES

NO. _____

Statement setting forth the details of filing by depositing in the United States mail with first-class postage prepaid, Petition for Writ of Certiorari.

I, S. Clark Woodroe, a member of the Bar of the United States Supreme Court, hereby make this statement in accordance with Rule 28.2 of the Rules of the United States Supreme Court.

I do hereby state and certify that the foregoing Petition for Writ of Certiorari in No. _____, Donald Bordenkircher, Superintendent v. Jinks Adkins, Jr., was filed pursuant to Rule 28 of the Rules of the United States Supreme Court, by depositing forty (40) copies in the United States Mail, first-class postage prepaid, and addressed to:

Alexander L. Stevas, Clerk
United States Supreme Court
Washington, D. Ct. 20543

on the 21st day of May, 1982.

S. Clark Woodroe

S. CLARK WOODROE

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

I, Helen G. Casto,
a Notary Public for the aforesaid State and County, do hereby certify that S. Clark Woodroe, whose name is signed to the foregoing document, dated the 21 day of May, 1982, has acknowledged the same before me on this 21 day of May, 1982.

My commission expires February 26, 1984.

Helen G. Casto

Notary Public